EXECUTIVE SUMMARY

PIAC Report: A Rate of Criminal Interest: Updating Garland for Consumers

Millions of consumers subscribe to utilities and telecommunications services on a monthly billing schedule. If consumers miss a payment due date, the service likely charges late payment interest and may apply a late payment penalty fee or charge a processing fee for accounts that have late payments. Beginning with the notable case of *Garland v. Consumers' Gas* before the Supreme Court of Canada in 1998, courts determined that the definition of "interest" is broad and a late payment penalty could be construed as an "interest" charge on an advancement of credit because a deferral of payment constitutes an advancement of payment under s. 347. It has been over ten years since the Supreme Court's decision in *Garland*. Since that decision, there have been more attempts to apply a broad interpretation of "interest" to charges arising from late payment penalty charges.

Non-sufficient fund fees may fall within the definition of "interest" for the purposes of s. 347 where there is no disclosure in the lending agreement that the NSF charge is a reasonable pre-estimate of costs that might be incurred by the lender as a result of a dishonoured cheque, or where there is no mention of a NSF fee. Where such disclosure is made, NSF fees will likely not fall within the definition of "interest" for the purpose of s. 347. Courts have also found processing fees that are sufficiently connected to the loan that is a charge payable or paid for the advancing of credit can constitute "interest". Insurance is not usually considered to be a form of interest, however if it is a mandatory condition of a standard form contract to secure an advance of credit, then it will be considered "interest" under s. 347 as it is an added cost of borrowing. Courts have applied s. 347 to interest charged in loan agreements between individuals and pawn shops. In a positive decision for consumers, *De Wolf v. Bell ExpressVu*, Justice Perell at the Ontario Superior Court of Justice found that an administrative fee on late accounts set out in Bell's standard form contract constituted "interest" under s. 347. However, the decision was overturned by the Ontario Court of Appeal on the basis that the fee was unrelated to the advancing of credit. Instead, the administration fee was a legitimate pre-estimate of the costs incurred by Bell ExpressVu when accounts remain outstanding and were thus recovery for a disbursement. Leave to appeal to the Supreme Court of Canada was denied.

One notable legal development since *Garland* is the use of class action lawsuits to enforce s. 347 of the *Criminal Code*. In many cases, these class action lawsuits target the payday lending industry. In cases where consumers are disputing charges related to late payments, the amount of the claim is too low to justify an individual taking on a utility giant or payday loan company. Class action claims have suffered delay in courts while addressing arguments such as the application of mandatory arbitration clauses

and limitation periods. Courts have been unwilling to allow mandatory arbitration clauses to prevent class proceedings under s. 347.

While class actions for late payment penalties and violations of s 347 certainly increase access to justice for consumers, class actions are limited in being able to provide direct remedies to the affected consumers. One of the most obvious benefits of the class action is the public awareness of late payment practices that arguably violate s. 347. However, class proceedings are lengthy and may leave the affected consumer without any remedy for several years. When legal questions are settled and if the class action is certified, then parties usually come to a settlement. Settlements unfortunately do not make a pronouncement on the legality of the defendant's behaviour and may take the class action out of the public realm as the terms of settlement may be confidential, decreasing negative publicity directed to the defendant. Settlements may also produce poor remedies for consumers. For example, some settlements for class proceedings against payday lenders have provided vouchers for redemption of payday lending services. These vouchers have the effect of perpetuating payday loan use and inducing customers to continue using their services. There are also practical difficulties with identifying customers who paid excessive late penalties and there have been observations that there is little uptake by eligible plaintiffs. Finally, there has been a trend of passing the cost of class action settlements back to customers. Enbridge has successfully applied to the Ontario Energy Board to recoup the costs of the $22 million settlement for *Garland v. Consumers Gas Co.* by increasing rates for its residential customers. Toronto Hydro and other municipal utilities in Ontario have similarly applied to the Ontario Energy Board to recover $17 million from ratepayers following a settlement of a class action relating to late fees. In effect, this move means that all consumers will ultimately pay the price for the late payment penalty practices of the utility industry.

Section 347 of the *Criminal Code* has undergone legislative reform to address concerns with the payday lending industry. Provinces wanted the ability to regulate payday loans and in 2007, s. 347 was amended to exempt payday lenders from criminal sanctions in provinces that license payday lenders and have implemented legislative measures designed to protect consumers and limit the overall cost of the loans. The resulting provincial regulation has been disappointing, with several of the provincial rates permitting excessive fees that translate to annual interest rates of 500% to 800%. The 60% ceiling imposed by s. 347 of the *Criminal Code* is less than adequate and the provincial regulations have not provided much better protection for consumers.

Other jurisdictions are also examining whether they need to specifically regulate the payday lending industry. In the United States, the regulation of payday lending is largely implemented at the state level. Only in sixteen states have there been an express interest rate cap for payday lending. The United States Congress passed a law that The United States Congress passed a law that caps lending to military personnel at a maximum of 36% APR, however there has not been federal legislation that caps interest rates for payday lending. The United Kingdom has also recognized the deep-seated nature of problems related to payday lending but has not recommended a cap

on interest rates levied by high-cost credit providers. In recent years, Australia has transferred regulatory responsibility for consumer credit from the states and territories to the Commonwealth Government. Australia is currently consulting for its National Consumer Credit Protection Reform Package, which will examine whether a national interest rate cap should be implemented. If an interest rate cap is implemented, this will directly impact the payday lending industry in Australia.

Compared to PIAC's 1998 survey of industry practices for charging late payment penalties, few telecommunications and utilities companies continue to charge administrative or processing fees for late payment penalties. All services providers continue to charge interest rates on late payments and most charge a fee for payments that bounce due to non-sufficient funds. Most providers specifically state in standard form contracts that they charge a fee for NSF bounces, likely to avoid the capture of their NSF fee into the definition of "interest". Recent class actions challenge how late payment penalties are charged when the customer pays bills on time but there is a delay in receiving the payment. The newest class action challenges Bell Canada's increase in the late payment interest rate.

While *Garland* was a positive step for consumers, it was recognized that its gains would never provide consumers with sufficient credit protection. Together with disappointing result in *De Wolf*, the provincial regulation of payday lenders that has allowed higher interest rates than the criminal usury rates and the problems with relying on class actions for consumer recourse, it seems that consumers have even fewer protections from exploitative credit arrangements today.

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